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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications Act	)	
of 1996	)	

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF U S WEST, INC.

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SUMMARY

In addressing the issues in this proceeding, the Commission should recognize that mandatory sharing of incumbent LEC facilities entails serious economic costs and has the substantial potential to impair competition rather than promote it. As the Supreme Court's decision in *Iowa Utilities Board* confirms, Congress understood that fact in establishing a statutory framework under which only selected elements of the incumbent's network would be subject to compulsory unbundling. By including section 251(d)(2) in the Act, Congress sought to limit the unbundling requirement of section 251(c)(3) to those elements as to which the competitive benefits of compulsory unbundling will exceed the competitive costs. The Commission should interpret and apply section 251(d)(2) in light of this procompetitive goal.

Proprietary network elements are subject to the "necessary" test of section 251(d)(2)(A). All other network elements are subject to the "impair" test set forth in section 251(d)(2)(B). By its plain language, section 251(d)(2)(B) asks only whether an entrant can feasibly provide service without access to an incumbent's network element, not whether it would simply be more expensive for an entrant to do so. Consistent with this statutory language, the procompetitive purposes of the Act, and the Supreme Court decision, the Commission should articulate the "impair" test as follows:

> *Failure to provide access to an incumbent's network element "impairs" an entrant's ability to provide service when the element (or a functional substitute) is unavailable from non-ILEC sources or is available from such sources* <u>*only*</u> *at prices or on terms that would preclude meaningful opportunities for competitive entry by an efficient competitor.*

This articulation of the "impair" test is an objective standard: It focuses on whether competitive entry by an *efficient competitor* is feasible without compelled access to the incumbent's element, not whether such competitive entry is feasible for a specific *individual* new entrant with a

particular business plan. In addition, the test cannot be satisfied merely by showing that it would be less expensive or otherwise more convenient for a new entrant to use the ILEC's element; rather, the question is whether there is a market failure such that lack of access would so increase costs as to preclude meaningful competitive entry.

The Commission, in applying this "impairment" test, should adopt uniform nationwide rules as to some elements and nationwide presumptions as to others. A uniform national rule stating that an element either is or is not subject to section 251(c)(3) would be appropriate for network elements as to which availability does not vary by geography or market. However, where the availability of an element does vary, the Commission should adopt rules that can accommodate the competitive conditions in particular markets. The Commission can achieve such a tailored approach without sacrificing administrability by adopting a set of presumptions, to be applied by states in section 252 proceedings, that presumptively require (or do not require) unbundling of an element where particular objective geographic or demographic conditions are met.

In developing such rules and presumptions, the Commission should rely heavily on the record of actual competition in the three years since enactment of the 1996 Act. Such real-world evidence is the best source of information on what competitors need and do not need in order to compete. The burden of proof should be on CLEC proponents of mandatory unbundling, both because mandatory unbundling is a departure from the normal operation of a competitive marketplace and because CLECs have unique access to market evidence concerning the costs and terms on which they can obtain elements from non-ILEC sources.

Based on the evidence presented in these comments, the attached *de Fontenay Report*, and the *UNE Fact Report*, U S WEST proposes the following rules and presumptions with respect to specific network elements.

1. Loops: The Commission should require loop unbundling nationwide, with an exception for high-capacity facilities. For facilities operating at transmission speeds of DS1 or higher, the Commission should adopt a presumption that no unbundling is required: CLECs can and do deploy their own fiber to provide services to the businesses and other high volume customers served by such facilities.

2. Network Interface Devices (NIDs): The Commission should treat the NID as part of the loop, requiring unbundling wherever ILECs are required to unbundle their loops.

3. Switching: The fact that CLECs compete in many areas using non-ILEC switching demonstrates that, at least in those areas, lack of unbundled access to the ILEC's switches does not preclude meaningful opportunities to compete. At a minimum, therefore, the Commission should adopt a presumption that any ILEC circuit switch within a 50-mile radius of one or more CLEC circuit switches (or packet switch providing voice services) should not be unbundled.

4. Signaling: The equipment that a CLEC needs to establish its own signaling network is available on a competitive basis from multiple vendors, and a limited investment in this equipment allows a CLEC to provide signaling over a very large area. On the other hand, each ILEC switch is associated with only one signaling network. Therefore, the Commission should require an ILEC to unbundle signaling only for those CLECs that obtain switching from the ILEC.

5. Interoffice Transmission Facilities: As a result of widespread deployment of fiber by non-ILECs, interoffice transmission facilities are widely available on a competitive basis. Where competitive alternatives for interoffice transport are available, the Commission should not require ILECs to unbundle their transport facilities. Specifically, the Commission should adopt a presumption that ILECs do not have to unbundle interoffice transmission facilities to or from wire centers that both (a) serve 20,000 or more loops, and (b) have one or more collocated CLECs.

6. Operator and Directory Assistance Services: The Commission should not impose any unbundling requirements for operator and directory assistance

services because ILECs have no market power or advantage over CLECs in the provision of these services.

7. Advanced Services: The advanced services market is open to competition; indeed, CLECs are already in the forefront of the provision of these services. Therefore, the Commission should not impose any unbundling obligations for facilities used solely in the provision of advanced services.

In light of the rapid pace of change in the telecommunications industry, these rules and presumptions will need to be modified over time. In particular, technological innovation almost certainly will make entry without access to ILEC elements substantially easier in the future than it is now. Therefore, the Commission should establish procedures and mechanisms to sunset or otherwise modify unbundled access requirements in a timely fashion as circumstances change.

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COMMENTS OF U S WEST, INC.

U S WEST, Inc. ("U S WEST") hereby submits these comments in response to the Commission's Second Further Notice of Proposed Rulemaking.[1] U S WEST respectfully suggests that the Commission adopt the principles, presumptions, and other mechanisms described below to implement section 251(d)(2) of the 1996 Act.

I. PRINCIPLES THAT SHOULD GUIDE THE COMMISSION'S INQUIRY

A. The Procompetitive Role of Section 251(d)(2)

The overriding goal of the Telecommunications Act of 1996 ("1996 Act") is to promote competition in telecommunications markets. As the Commission has recognized in a variety of contexts[2] — and as demonstrated in this proceeding by the affidavit of Jerry A.

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[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Second Further Notice of Proposed Rulemaking, FCC 99-70 (rel. April 16, 1999) ("*Second FNPRM*").

[2] *See, e.g., Access Charge Reform*, 12 FCC Rcd 15982, 16060 ¶ 180 (1997) ("[O]ur rules should promote competition, not protect certain competitors."); *Amendment of Part 90 of the Commission's Rules To Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, 12 FCC Rcd 9972, 10001 ¶ 96 (1997) (rejecting suggested eligibility limitations "because it confuses protecting individual competitors with promoting competition"); *Bell Atlantic Mobile Systems, Inc. and NYNEX Mobile Communications Company*, 12 FCC Rcd 22280, 22288 ¶ 16 (1997) ("Our statutory duty is to protect efficient competition, not competitors.").

Hausman and J. Gregory Sidak[3/] — promoting *competition* is not the same thing as aiding *specific competitors*. Consistent with this well-established principle, the statutory framework Congress established in section 251 is intended to advance competition and improve consumer welfare generally, not to help or hinder any specific competitor or type of competitor.[4/] Thus, the ultimate standard by which the Commission should measure progress under the 1996 Act is whether consumers are benefitting from competition, *not* whether a certain number of carriers have entered a market or whether every competitor is profitable.

Section 251(d)(2) plays a crucial role in this statutory framework. While government-imposed requirements to share facilities always will be in the best interest of the specific competitors that seek to take advantage of such requirements, the effect on *competition* is mixed. Under certain conditions, government-managed sharing of facilities can benefit competition by offering a way to circumvent entry barriers, enabling new competitors to enter the market sooner and in greater numbers than they otherwise might. On the other hand, government-managed sharing also entails real economic costs and in many cases hinders competition more than it helps. Indeed, as the attached report prepared by de Fontenay, Savin & Kiss ("*de Fontenay Report*") demonstrates, CLECs entering the market typically have decided *against* relying on incumbent elements because they recognize that robust competition requires having their own facilities so they can differentiate their services and develop new ones. Section 251(d)(2) is intended to limit the sharing requirement of section 251(c)(3) to those limited

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3/ *See* Affidavit of Jerry A. Hausman and J. Gregory Sidak at ¶¶ 56-72 ("*Hausman & Sidak Affidavit*") (submitted on behalf of the United States Telephone Association ("USTA")).

4/ *See* H.R. Conf. Rep. No. 104-458, at 1 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 124 (stating that the 1996 Act "open[s] all telecommunications markets to competition" as a *means* of bringing "advanced telecommunications and information services to all Americans").

market situations in which the competitive benefits of mandated sharing outweigh these types of competitive costs.[5]

The competitive costs of mandatory sharing include diminished incentives for incumbents to invest in the maintenance and improvement of their facilities and inefficiencies and delays associated with having regulatory proceedings, rather than market forces, determine the terms on which facilities may be obtained. Justice Breyer discussed these costs at length in his concurring opinion in *Iowa Utilities Board*:

> [C]ompulsory sharing can have significant administrative and social costs inconsistent with the Act's purposes . . . Even the simplest kind of compelled sharing . . . means that someone must oversee the terms and conditions of that sharing. Moreover, a sharing requirement may diminish the original owner's incentive to keep up or to improve the property by depriving the owner of the fruits of value-creating investment, research, or labor. . . . The more complex the facilities, the more central their relation to the firm's managerial responsibilities, the more extensive the sharing demanded, the more likely these costs will become serious. And the more serious they become, the more likely they will offset any economic or competitive gain that a sharing requirement might otherwise provide.[6]

In addition, sharing requirements diminish the incentives of competitors to develop facilities and systems that could serve as true alternatives to those of the incumbent. As Justice Breyer observed, an overbroad sharing requirement artificially narrows the scope of

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[5] *See,* e.g., AT&T *Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 753-54 (1999) (Breyer, J., concurring in part and dissenting in part) ("[T]he statute's unbundling requirements, read in light of the Act's basic purposes, require balance. Regulatory rules that go too far, expanding the definition of what must be shared beyond that which is essential to that which merely proves advantageous to a single competitor, risk costs that, in terms of the Act's objectives, may make the game not worth the candle.").

[6] *Id.* at 753-54 (citation omitted).

competitive efforts and, in the case of an unlimited sharing requirement, drains "competition" of virtually all substantive effect.

> It is in the *un*shared, not in the shared, portions of the enterprise that meaningful competition would likely emerge. Rules that force firms to share *every* resource or element of a business would create, not competition, but perverse regulation, for the regulators, not the marketplace, would set the relevant terms. . . . [A] world in which competitors share every part of an incumbent's existing system . . . is a world in which competitors would have little, if anything, to compete about.[7]

From an economic perspective, therefore, regulators should impose compelled sharing requirements only in highly selected circumstances. For example, where entry barriers otherwise would preclude competition, a sharing requirement may be procompetitive. However, the requirement should be narrowly tailored to overcoming those entry barriers. Moreover, a showing that entry barriers preclude the entry of particular *individual competitors* should not be sufficient. In the absence of a demonstrated competition-related need, sharing should not be required.

The Supreme Court decision in *Iowa Utilities Board* confirms that the 1996 Act recognizes these principles, using section 251(d)(2) to place definite limits on the scope of the unbundled access requirement of section 251(c)(3). The Court rejected the idea that Congress

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[7] *Id.* at 754; *see also The Telecommunications Act of 1996: Moving Toward Competition under Section 271, Hearing before the Subcomm. on Antitrust, Business Rights, and Competition of the Senate Comm. on the Judiciary*, S. Hrg. 105-565, at 64 (Mar. 4, 1998) (testimony of WinStar CEO William Rouhana, Jr.) ("Let me . . . tell you that I think there are really two important things that need to be done in order for there to be meaningful local competition. First and foremost, I really do think we need alternate facilities. I do not believe that resale or the use of the Bell Company facilities truly creates the environment that was intended by the Act. It does not stimulate the kind of competition that brings innovative services to consumers, that takes maximum advantage of technology, and that is one of the things I think we really need to do.").

intended to provide relatively unrestricted "blanket access" to incumbents' networks.[8] The Court likewise repudiated the notion that the Act creates "some underlying duty to make all network elements available," with section 251(d)(2) permitting but not requiring exceptions.[9] Instead, the Court held that section 251(d)(2) requires the Commission to be selective, imposing unbundling only where doing so would promote the procompetitive goals of the Act.[10]

In particular, the Court held that the tests in section 251(d)(2) (the "necessary" and "impair" tests) must be given content in at least two ways. First, the tests cannot be satisfied on the basis of just any increase in cost or decrease in quality.[11] Rather, unbundling may be required only upon some more extensive showing of competitive need. Second, the Commission, in applying the necessary/impair tests, should consider whether competitors could obtain the element in question from sources outside the incumbent's network.[12] The availability of elements from other sources plainly has a significant bearing on the extent of any competitive need for government-mandated unbundled access.

In sum, both the procompetitive purposes of the 1996 Act and the Supreme Court's decision in *Iowa Utilities Board* demonstrate that, to implement section 251(d)(2) faithfully, the Commission should require unbundled access only where the Commission identifies a specific market failure that mandatory unbundling would help alleviate. Thus, if a

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8/ *Iowa Utils. Bd.*, 119 S. Ct. at 735.

9/ *Id.* at 736.

10/ *Id.* at 734-35 ("[T]he Act requires the FCC to apply *some* limiting standard, rationally related to the goals of the Act").

11/ *Id.* at 735.

12/ *Id.*

market failure such as high entry barriers gives the incumbent market power with respect to a particular element that is sufficient to preclude meaningful competition in the provision of telecommunications service, compulsory unbundled access to that element may be appropriate. With respect to all elements as to which the incumbent does not have sufficient market power to preclude meaningful competition, the Commission should allow market forces to govern.[13/]

B. The Essential Facilities Doctrine as a Useful Guide

The "essential facilities doctrine" of antitrust law reflects the collective efforts of courts and scholars to resolve the same type of economic and competition law issues faced by the Commission in implementing section 251(d)(2) — how to identify those particular cases where the competitive benefits of compulsory sharing of facilities outweigh the competitive costs. The essential facilities doctrine and the necessary/impair standards of section 251(d)(2), while differently stated, both seek to promote increased competition and enhanced consumer welfare. Thus, although section 251(d)(2) may not have simply transplanted all the particulars of the essential facilities doctrine into section 251, the Commission can and should look to the essential facilities doctrine as a guide to determining the circumstances under which compulsory sharing is likely to serve or disserve the public interest.[14/]

The essential facilities doctrine emphasizes that mandatory sharing serves the public interest only where access to an incumbent's facility is truly *essential* to the development

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13/ Avoiding unnecessarily expansive unbundling obligations also minimizes the risk that such an obligation could be found to result in an unconstitutional taking of an incumbent's property, making the federal government liable for potentially millions of dollars.

14/ *See, e.g.*, *Iowa Utils. Bd.*, 119 S. Ct. at 753 (Breyer, J., concurring in part and dissenting in part) ("[A]lthough the provision describing which elements must be unbundled does not explicitly refer to the analogous 'essential facilities' doctrine . . . the Act, in my view, does impose related limits upon the FCC's power to compel unbundling.").

of competition. Where market entry without such access is reasonably possible, scholars on the subject have concluded that compulsory access on regulated terms actually can have counterproductive effects on competition.[15] Thus, as the Supreme Court has cautioned here, the doctrine reinforces the need for the Commission to be very careful in selecting the elements for which unbundling will be required. Section 251(d)(2), like the essential facilities doctrine, was intended by Congress to ensure that unbundling not be used to protect the profit margins and business plans of particular competitors at the expense of the public interest and competition.

C. Experience with Actual Competition

While the essential facilities doctrine provides helpful guidance on the *theoretical* underpinnings for a new approach to section 251(d)(2), experience with actual competition in the years since enactment of the 1996 Act provides essential *practical* indications of what non-incumbent carriers do and do not need in order to compete. In contrast to the situation at the time of the 1996 *Local Competition Order*,[16] the Commission now has the opportunity to examine three years of competition in the marketplace for local services. Such real-world evidence offers a far more reliable source of information about competitive conditions with respect to specific elements than any economic model or other theoretical construct possibly could. In the words of

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15/ *See, e.g.*, Alfred E. Kahn, *Letting Go: Deregulating the Process of Deregulation* 48 (1998) (sharing requirements "in a very real sense discourage competition itself, in the name of encouraging it: if potential competitors can obtain from incumbents, at regulatorily-prescribed prices, not just facilities and services that are naturally monopolistic but any and all others — present and future — that could feasibly be supplied independently, the incentive of incumbents to innovate and of competitors to provide their own will be attenuated."); *see generally Hausman & Sidak Affidavit* ¶¶ 74-82.

16/ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*").

Commissioner Powell, the availability of this empirical evidence allows the Commission to "build an unbundling regime from the ground up, not the top down."[17]

Thus, rather than merely speculating about what network elements competitors need from incumbents, the Commission should rely in the first instance on empirical evidence concerning the actual competitive behavior of the numerous CLECs that are now providing service. Such an evidence-based approach will greatly enhance the Commission's ability to make accurate determinations as to whether specific unbundling requirements would promote competition or impair it. In an effort to aid the Commission in taking this path, these comments rely heavily on such empirical evidence in the form of both USTA's *UNE Fact Report* and the *de Fontenay Report*, which reflects the authors' independent study, beginning last year, of how an actual, prospective new entrant could obtain facilities to offer telecommunications services.

Furthermore, the Commission now has available to it the experiences of other nations that have wrestled with the same fundamental economic question of how broad unbundling obligations should be. As detailed in the *de Fontenay Report*, a global approach appears to be emerging in which regulators are imposing far more limited unbundling requirements than those initially imposed by the Commission in 1996.[18] The Canadian Radio-television and Telecommunications Commission ("CRTC"), for example, adopted an approach in May 1997 that largely limits unbundling obligations to loops and directory listings.[19] According to the CRTC, "efficient and effective competition will be best achieved through

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[17] *Second FNPRM*, Statement of Commissioner Powell.

[18] *See de Fontenay Report* at 49-64.

[19] Telecom Decision CRTC 97-8 (rel. May 1, 1997) ("*Canadian Local Competition Decision*").

facilities-based competitive service providers; otherwise, competition will only develop only at the retail level, with the ILECs retaining monopoly control of wholesale level distribution."[20] Regulators in the UK and the Netherlands also have chosen to adopt only limited unbundling obligations.[21] And according to one survey of international telecommunications deregulation, "Chile's *absence* of unbundling requirements . . . has helped unleash a remarkable level of competition in the provision of local services."[22] However necessary the need for unbundling may have appeared in 1996, the Commission should now consider carefully these emerging international perspectives on unbundling and competitive market entry as a caution against imposing a broad unbundling regime that jeopardizes the continued development of telecommunications infrastructure and facilities-based competition in the United States.

II. THE LEGAL TEST FOR DETERMINING WHETHER THE IMPAIR AND NECESSARY STANDARDS ARE SATISFIED.

Section 251(d)(2) provides that:

> In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether —
>
> > (A) access to such network elements as are proprietary in nature is necessary; and
> >
> > (B) the failure to provide access to such network elements would impair the ability of the

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20/ *Id.* ¶ 73; *see also Hausman & Sidak Affidavit* ¶ 78.

21/ *de Fontenay Report* at 51-56.

22/ Pablo T. Spiller and Carlo G. Cardilli, *The Frontier of Telecommunications Deregulation: Small Countries Leading the Pack*, 11 J. Econ. Perspectives 127, 137 (1997) (emphasis added).

> telecommunications carrier seeking access to provide the services that it seeks to offer.[23]

As the Commission, the Eighth Circuit, and the Supreme Court all have recognized, this section establishes two standards. The necessary test in subsection (A) applies to network elements that "are proprietary in nature." Subsection (B) applies to all network elements generally, without qualification. Thus, section 251(d)(2) embodies a "requirement that [the Commission] consider whether access to proprietary elements [is] 'necessary' and whether lack of access to nonproprietary elements would 'impair' an entrant's ability to provide local service."[24] Congress imposed a higher "necessary" standard for the unbundling of proprietary elements because it recognized that forced sharing of such elements necessarily decreases incentives to invest and innovate. Accordingly, while all elements must meet the impair test before they can be required to be unbundled, proprietary elements must meet an additional criterion in order for unbundling of such elements to be "necessary" within the meaning of section 251(d)(2).

A. The "Impair" Test

By its plain language, section 251(d)(2)(B) asks only whether an entrant can feasibly provide service without access to an incumbent's network element. The focus of this inquiry should be whether the prices and terms on which an element (or its functional substitute) is available from non-ILEC sources allow an efficient competitor to enter the market. Section 251(d)(2)(B) does not ask whether these prices and terms are better or worse than those that

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[23] 47 U.S.C. § 251(d)(2).

[24] *Iowa Utils. Bd.*, 119 S. Ct. at 728; *see also Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 811 n.31 (8th Cir. 1997); *Local Competition Order*, 11 FCC Rcd at 15642-43 ¶¶ 283-85.

would be available from the incumbent; it simply asks whether they are *adequate* to permit competition.[25] As the Supreme Court explained, an entrant whose potential profits are merely reduced may have "perhaps been 'impaired' in its ability to amass earnings, but has not ipso facto been 'impaired . . . in its ability to provide the services it seeks to offer.'"

Accordingly, to be faithful to the statutory language, the Commission should articulate the "impairment" test as follows:

> *Failure to provide access to an incumbent's network element "impairs" an entrant's ability to provide service when the element (or a functional substitute) is unavailable from non-ILEC sources or is available from such sources only at prices or on terms that would preclude meaningful opportunities for competitive entry by an efficient competitor.*

This standard tracks the language adopted by the Commission itself in connection with section 251's nondiscrimination obligation. In particular, the Commission ruled that the purposes of section 251 require that network elements must be provided "on terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete."[26] The same goals underlie the determination of *what* elements must be provided: If an element is not needed to provide a meaningful opportunity for an efficient competitor to provide service, there is no reason to require that it be unbundled, particularly given the costs and distortions otherwise created by forced sharing.

25/ *Iowa Utils. Board*, 119 S. Ct. at 735; *see also id.* at 753 (Breyer, J., concurring in part and dissenting in part) (key issue is whether "a new entrant could *compete effectively* without the facility" in question) (emphasis added).

26/ *Local Competition Order*, 11 FCC Rcd at 15660 ¶ 315.

1. Actual and Potential Competition as Evidence of the Absence of Impairment

In determining whether lack of access to an element will "preclude meaningful opportunities for competitive entry," the Commission should, consistent with the Supreme Court's directive, consider the practical "availability of elements outside the incumbent's network."[27] And that task requires the examination of *all* potential outside sources of elements — other carriers, noncarrier sources (e.g., ISPs), and self-provisioning.[28]

In the first instance, the Commission should look to the past three years of experience of actual competition to determine which elements can be obtained from other sources. Evidence that one or more CLECs are obtaining an element in a geographic market from non-ILEC sources conclusively demonstrates that mandatory unbundling of that element is not appropriate in that market: In such a case, lack of mandatory access to the element from the ILEC clearly does not preclude meaningful opportunities for competitive entry by one or more competitors. First, the fact that at least one CLEC can self-provision in the market means that other efficient competitors should be able to do so as well. Second, even if new entrants choose not to self-provision the element, they can negotiate to lease the element (or capacity on the element) at market-based rates from either the ILEC or the facilities-based CLEC(s). Even in the absence of a *mandatory* unbundling requirement, both the ILEC and the facilities-based CLEC have strong incentives to lease their facilities at a market price.[29]

27/ *Iowa Utils. Bd.*, 119 S. Ct. at 735.

28/ *Id.*

29/ *See, e.g.*, *Hausman & Sidak Affidavit* ¶ 73. Even if the CLEC and ILEC do not have the current capacity available to lease, they typically can economically expand capacity. *Id.*
(continued...)

At the same time, the fact that no facilities-based CLEC is already serving a particular geographic market does not necessarily mean that alternative sources of elements are unavailable in that market. If competition is feasible without mandated sharing of an ILEC element in one market, it should be similarly feasible in other markets with the same or similar economic characteristics. The point of inquiring into what facilities CLECs have actually deployed and from whom they have obtained these facilities is to determine which incumbent-provided elements have in practice proved to be prerequisites of competitive entry and, conversely, which elements can as a practical matter be obtained and used from other sources. For example, network elements such as DSLAMs and switches are scalable and relatively inexpensive, and it may be reasonable to expect a competitor to purchase its own equipment of this sort even if no other network provider in the geographic market has done so already. Likewise, if a CLEC has obtained particular elements from non-ILEC sources in one market, then it is reasonable to at least presume that those elements are also available from non-ILEC sources in other markets with similar relevant characteristics.[30]

29/ (...continued)
¶ 130. Moreover, the fact that two or more carriers are operating an element at capacity makes it almost certain that an efficient competitor could feasibly self-provision that element.

30/ Indeed, even in markets where it is economically infeasible to obtain an element from a non-ILEC source, that market failure may have nothing to do with an ILEC's residual market power and may instead be due to the regulatory environment. *See* William E. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 975-76 (1981). For example, in residential markets, universal service subsidies keep prices below cost, meaning that a carrier generally may not make profits from serving just a particular residential market. But a showing that obtaining an element from a non-ILEC source to serve a particular residential market is economically infeasible (because serving the market would be unprofitable) cannot justify compelled unbundling of that element if a CLEC can then turn around and use the element to serve the business market in the same area at above-cost rates.

Put another way, the Commission should give weight not only to actual competition in particular markets, but also to *potential* competition in cases where the evidence indicates that it is possible and practical for another company to enter the market and provide a substitute facility. "[E]ven if the [incumbent's] facility is currently the only one in its market, no competitive injury will be forthcoming if entry barriers are low."[31] For example, the forced sharing of the sole gas pipeline currently operating in a local market is not appropriate where it is economically feasible for other pipeline companies to extend their networks into that market.[32] Likewise, the fact that only an incumbent has a particular element in a given market does not mean that element is unavailable from alternative sources if it is economically feasible for an entrant to provide its own. And the fact that CLECs have self-provided that element in other similar markets strongly suggests self-provisioning is feasible.

Indeed, if CLEC deployments in similar geographic markets demonstrate that it is in fact possible to deploy substitutes for a given incumbent element, requiring unbundling will actually thwart the development of a competitive market by *discouraging* the deployment of these substitute facilities:

> [E]ntry is the preferred route that will result in real competition rather than mere sharing of a monopoly. If entry in response to monopoly prices is in fact possible, then it is counterproductive for an antitrust tribunal to force the current monopolist to share its facility; the plaintiff's right to share, particularly at judicially

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[31] IIIA Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 773c, at 209 (rev. ed. 1996).

[32] *See Illinois ex rel. Burris v. Panhandle Eastern Pipe Line Co.*, 935 F.2d 1469, 1482 (7th Cir. 1991); *Illinois ex rel. Hartigan v. Panhandle Eastern Pipe Line Co.*, 730 F. Supp. 826, 927-28 (C.D. Ill. 1990).

regulated prices, reduces or eliminates its incentive to enter by other means.[33]

2. Factors of Limited or No Relevance to the Impairment Inquiry

Differences in Cost and Economies of Scale. The Supreme Court expressly ruled that the Commission may not deem every cost increase to be an "impairment" that justifies unbundling. Section 251(d)(2)'s language asks whether a competitor's general "ability to provide service" is impaired, *not* its "ability to provide service profitably using any particular business plan of its choosing." Accordingly, if CLECs have in practice been able to enter the market using non-ILEC sources for a particular network element, the fact that the next entrant might find it less expensive or more convenient to use the incumbent's element does not change the reality that competition is both possible and feasible *without* compelled unbundling, regardless of any difference in cost.

The standard for forcing an incumbent to share its facilities should be an objective one, with reference to the marketplace, rather than in terms of individual rivals' subjective desires. Because the goal of section 251 "is not to permit individual rivals to survive, but to make markets more competitive," forced sharing of facilities is not appropriate "when actual or potential rivals *other than the plaintiff* are able to compete without the claimed facility."[34] A facility must be shared "only when it is vital to both the plaintiff's individual competitive viability and the viability of the market in general."[35] As Judge Posner has explained, "[t]he

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33/ IIIA Areeda & Hovenkamp, *supra*, ¶ 773c, at 209.

34/ *Id.* ¶ 773b3, at 206, 207 (emphasis added).

35/ *David L. Aldridge Co. v. Microsoft Corp.*, 995 F. Supp. 728, 752-53 (S.D. Tex. 1998).

policy of competition is designed for the ultimate benefit of consumers rather than of individual competitors."[36] Accordingly, any difference in cost must be judged with reference to an efficient competitor, not each individual CLEC with its unique business plan.[37] And where one or more CLECs already are providing service by obtaining a particular element from a non-ILEC source, any cost difference for the element by definition does not preclude meaningful opportunities for competitive entry.

A corollary of this principle is that the impair test should not be set at the lowest common denominator so that *every* carrier — no matter what its size, capital, or investment in facilities — can profitably employ a UNE-based entry strategy. As Justice Breyer noted, "[r]egulatory rules that go too far, expanding the definition of what must be shared beyond that which is essential to that which merely proves advantageous to a single competitor, risk costs that in terms of the Act's objectives, may make the game not worth the candle."[38] It is entirely reasonable to expect that a carrier with few customers or little capital may have to enter the market through resale first before "graduating" to unbundled network elements. If some firms are able to compete without access to a given incumbent facility, requiring access is not appropriate, even if other rivals are too small to compete without access.[39]

36/ *Marrese v. American Academy of Orthopedic Surgeons*, 706 F.2d 1488, 1497 (7th Cir. 1983).

37/ *Hausman & Sidak Affidavit* ¶¶ 61, 70-71.

38/ *Iowa Utils. Board*, 119 S. Ct. at 754 (Breyer, J., concurring in part and dissenting in part).

39/ *See, e.g., Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986) (rejecting independent equipment vendor's claim that Western Union's sales channels were essential facilities based on evidence that other independent vendors were able to

(continued...)

In particular, the "impairment" test cannot be met merely by showing that lack of access to an element would prevent an entrant from taking advantage of the same economies of scale as the incumbent. The existence of a scale economy simply means that there may be a cost difference between an incumbent-provided element and the same element provided by a third party. Because an incumbent by definition is likely to enjoy greater economies of scale than a new entrant,[40/] a regime under which all differences in economies of scale were sufficient to meet the impairment test would effectively require the unbundling of virtually every element on the basis of this cost difference. But the Supreme Court held in unmistakable terms that such a cost difference, standing alone, does not necessarily "impair the ability of [a] telecommunications carrier . . . to provide the services that it seeks to offer," and that a rule defining "any increase in cost[s]" as an impairment violates Congress's intent.[41/] The existence of economies of scale, without more, says nothing about whether the terms on which elements are available from non-ILEC sources are adequate to permit competitive entry.

By incorporating a higher standard of "impairment" than "any increase in costs," the Telecommunications Act parallels antitrust law. Antitrust authorities consistently hold that an incumbent need not share its facility with a rival simply because it would be cheaper for the

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39/ (...continued)
compete without access; Western Union "had no duty to use its salesmen at its expense to do Olympia's selling merely because Olympia was too weak to compete successfully against Western Union with a sales force of its own.").

40/ Conversely, an incumbent is likely to be saddled with various inefficiencies that a new entrant will not. An entrant, for example, can incorporate the most advanced and efficient equipment in its network, while an incumbent's network may contain older, less efficient elements.

41/ *See Iowa Utils. Bd.*, 119 S. Ct. at 735.

rival (whether because of economies of scale or other reasons) to use the incumbent's facility rather than that of a third party. Instead, the firm seeking access must demonstrate its "inability practically or reasonably to duplicate" the incumbent's facility.[42] To justify forced sharing, a "facility must be more than an input for which the monopolist enjoys a cost advantage, lest we turn every dominant firm enjoying significant scale economies into a public utility. . . . For example, a monopolist may enjoy economies of scale in its plant, advertising, or distribution network. If scale economies are substantial, then any new rival faces higher costs than does the monopolist. Nevertheless, we would not regard the monopolist's large plant as an essential facility that must be shared with others."[43] The same conclusion follows in the context of section 251(d)(2): Even if an ILEC enjoys economies of scale in an element that a CLEC (at least initially) does not, those economies do not justify mandatory unbundling of the ILEC element in the absence of a showing that the CLEC simply would not have a meaningful opportunity to compete without compelled access to that ILEC element.

The unbundling of an element also cannot be justified on the basis of a difference between the cost of self-provisioning or obtaining the element from a non-ILEC source and the regulatory TELRIC price. As the Supreme Court made clear, the focus of the impair test is not whether access to an element is needed to allow the CLEC to maximize its profits. Rather, the question is whether an efficient CLEC has a meaningful opportunity to compete by obtaining the element from a non-ILEC source, even if the TELRIC price might be cheaper. The answer to that question has little to do with the TELRIC price of an element, because, under the

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42/ *MCI v. AT&T*, 708 F.2d 1081, 1132 (7th Cir. 1982).

43/ IIIA Areeda & Hovenkamp, *supra*, ¶ 773b2, at 205-06.

Commission's methodology, TELRIC is *not* a reflection of the ILEC's actual costs of its real network, but of a hypothetical network using the most efficient technology available.[44/] In other words, the ILEC's cost is by definition almost certain to be higher than the TELRIC price. As a result, the fact that a CLEC's costs also may be higher than TELRIC if it obtains an element from a non-ILEC source provides little or no information about whether the CLEC can meaningfully compete with the ILEC or with other carriers.

Finally, mandatory unbundling generally cannot be justified on the theory that a CLEC will otherwise incur "sunk costs." First, many investments in network elements, while perhaps "fixed," do not constitute "sunk costs." The cost of a switch, for example, may be fixed, but it is not a "sunk cost": If a purchaser of a switch subsequently exits the market, it can sell the switch and associated software to another carrier.[45/] Second, the presence of some sunk costs means no more than that a prospective entrant must have a certain level of capitalization in order to enter on a facilities basis. As discussed above, the fact that not every firm can achieve that threshold capitalization is not itself sufficient reason to find the impair test met. Of course, the risk that a CLEC might lose its sunk costs constitutes a normal risk of entry in any market and cannot be said to "preclude meaningful opportunities for competitive entry by an efficient competitor" in the absence of strong evidence that the risk is so great and the potential sunk costs so high that entry is not economically feasible.

<u>Section 271.</u> The section 251(d)(2) inquiry is logically independent from section 271, and the fact that Congress listed a number of elements that BOCs must make available to

44/ *Local Competition Order*, 11 FCC Rcd at 15848 ¶ 684.

45/ *Hausman & Sidak Affidavit* ¶ 84.

obtain interLATA relief does not mean that the "necessary" and "impair" tests may be modified to guarantee that they generate the same list. As an initial matter, unlike the section 251 unbundling obligations (which apply to all incumbent LECs whatever their market plans), section 271's list applies only to those BOCs that choose to apply for authority to provide in-region interLATA services. Moreover, elements unbundled under section 271 are not subject to TELRIC pricing. Because the two provisions apply to distinct, albeit overlapping, sets of carriers and involve different pricing schemes, it would make little sense to import the list of elements in section 271 into section 251. The more sensible reading is that Congress reasonably determined that a greater degree of unbundling than might otherwise be required should be one of the quids for the quo of in-region interLATA authority.

Moreover, section 271 itself treats the unbundling of the specifically listed elements as a separate question from what must be unbundled under section 251. Section 271(c)(2)(B)(ii) requires a BOC seeking interLATA authority to provide "[n]ondiscriminatory access to network elements in accordance with the requirements of section 251(c)(3) and 252(d)(1)." It then separately lists a series of elements that must be unbundled in section 271(c)(2)(B)(iii) through (vii). If Congress had expected that application of section 251's necessary and impair tests would result in the unbundling of all the specific elements listed in section 271, there would have been no need for Congress to include that specific list in the first place. Congress understood, however, that a proper application of sections 251 and 252 might not yield the unbundling of *all* the network elements that Congress thought necessary for interLATA relief; hence, it added the specific list of elements found in section 271.

Section 271 demonstrates that Congress knew how to specify a list of network elements. Determining what elements to unbundle pursuant to section 251 by reference to the list in section 271 would unlawfully reverse Congress's decision *not* to include a specific list of elements in section 251.

Combinations and the UNE Platform. The impair analysis should focus only on individual elements, not combinations of elements. In other words, the Commission should apply the impair test on an element-by-element basis. If, at the end of the analysis, two elements already combined in an ILEC's network each independently satisfy the impair test, then, under Rule 315(b), the ILEC cannot separate them. Conversely, if only one of two elements already combined in an ILEC's network satisfies the necessary/impair test, the ILEC must provide that element "in a manner that allows requesting carriers to combine [that] element[] in order to provide . . . telecommunications service." 47 U.S.C. § 251(c)(3). Accordingly, a CLEC can always combine the element it obtains from an ILEC with others that it self-provisions or obtains from other sources to construct a network — the lack of combined elements from the ILEC will not in any way prevent the CLEC from providing service.

The unbundling of an individual element also cannot be justified on the ground that the element is needed as part of the so-called UNE platform. Indeed, as the Supreme Court's decision indicates, such an approach would assume an outcome that may very well be unjustified. In response to ILEC arguments concerning the UNE platform, the Court stated that the whole question may well be "academic" in light of its necessary/impair ruling because, "[i]f the FCC on remand makes fewer network elements unconditionally available through the unbundling requirement, an entrant will no longer be able to lease every component of the network."[46/] Clearly, any attempt to justify the unbundling of a particular element on the basis

46/ *Iowa Utils. Bd.*, 119 S. Ct. at 737.

that it is part of the UNE platform would turn the Supreme Court's ruling inside out. Nor can the unbundling of the platform be justified on the theory that some CLECs are unable to provide any of their own facilities. Such CLECs do not need the platform to enter — they can rely on the functional equivalent of resale and gradually ramp up to obtaining their own facilities. Indeed, the fact that the Act explicitly provides resale as a competitive option makes clear that a CLEC could not be impaired (*i.e.*, precluded from meaningful opportunities to compete) by not having access to the platform. As Justice Breyer properly asked, if Congress had intended unbundling to lead to the availability of the UNE platform, "would Congress have seen a need for a separate wholesale sales requirement (since the "unbundling" requirement would have led to a similar result)?"[47] The answer clearly is no.

In the end, if the Commission faithfully applies the necessary and impair tests to each individual element, CLECs will have access to the elements they need to compete — either from the ILEC or from other sources — and they will be able to combine those elements into a network from which they can provide service.

Delays in Self-Provisioning. Any delays inherent in a particular competitor self-provisioning an element, such as the time needed to set up a commercial relationship with a vendor, cannot justify mandatory unbundling for at least three reasons. First, the fact that many CLECs today are using self-provisioned facilities conclusively demonstrates that any delay from such self-provisioning does not preclude the development of competition. Second, because self-provisioning, ordering, constructing, and similar tasks by definition take a certain amount of time, any finding that this inherent delay was sufficient to constitute impairment would mean that

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[47] *Iowa Utils. Bd.*, 119 S. Ct. at 754 (Breyer, J., concurring in part and dissenting in part).

the impair test would always be met for every element today and in the future — in other words, such a finding would gut the impair standard in much the same way as the Commission's original rule that any cost increase or any decrease in quality was an impairment. Third, any rule taking into account delay in self-provisioning would require administratively complex determinations regarding time differences between self-provisioning and ILEC provisioning.

B. The "Necessary" Test

Before the Commission may require the unbundling of a "proprietary" network element, it must conclude that access to such an element is "necessary." 47 U.S.C. § 251(d)(2)(A). Congress adopted a higher threshold for "proprietary" elements in order to avoid dampening ILECs' incentives to innovate and invest. Under the necessary test, lack of access to a proprietary element must not only impair an efficient entrant's ability to provide service, but it must be impossible to provide service without that element or its functional substitute.

The necessary test in section 251(d)(2)(A) was intended to preserve and sharpen incumbents' incentives to innovate and invest in their networks. The law in the United States has always recognized the need to protect intellectual property in order to promote investment. The right of exclusivity conferred by intellectual property law provides "an incentive to inventors to risk the often enormous costs in terms of time, research, and development."[48/]

Conversely, of course, any requirement that a firm share its intellectual property with its rivals discourages it from investing and innovating. Indeed, the Commission itself

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48/ *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480 (1974); *see also* U.S. Dept. of Justice & Federal Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property* ¶ 1.0 (1995) ("The intellectual property laws provide incentives for innovation and its dissemination and commercialization by establishing enforceable property rights for the creators of new and useful products [and] more efficient processes.").

recognized this very point in its *Local Competition Order*: "We acknowledge that prohibiting incumbents from refusing access to proprietary elements could reduce their incentives to offer innovative new services."[49]

As a result of the harmful effects of forced sharing on incentives to invest and innovate, antitrust law universally recognizes that a much higher threshold must be met before ordering the sharing of intellectual property and network innovations. As Federal Trade Commission Chairman Robert Pitofsky recently explained, "antitrust enforcers should proceed cautiously in breaking up or mandating access to an existing network, even when that network is dominant. . . . That is particularly true when the network derives from intellectual property, a concept that has traditionally influenced antitrust policy which recognizes the wisdom of encouraging innovation."[50]

Forced sharing of proprietary elements would be particularly destructive in the areas of new and advanced services, since that is where innovation and investment are most prevalent and vital today. Congress expressly recognized the importance of encouraging the development of new technologies and innovations by enacting section 706, which expressly commands the Commission to avoid adverse impacts on the development and deployment of

[49] *Local Competition Order*, 11 FCC Rcd at 15641-42 ¶ 282; *see also Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 281 (2d Cir. 1979) ("It is the possibility of success in the marketplace, attributable to superior performance, that provides the incentives on which the proper functioning of our competitive economy rests. If a firm that has engaged in the risks and expenses of research and development were required in all circumstances to share with its rivals the benefits of those endeavors, this incentive would very likely be vitiated.").

[50] Speech by Robert Pitofsky, Chairman, Federal Trade Commission, American Bar Association Section of Antitrust Law's Antitrust Issues in High-Tech Industries Workshop, Scottsdale, Arizona, Feb. 26, 1999 (*available at* <http://www.ftc.gov/speeches/pitofsky/hitch.htm>, *visited* May 26, 1999).

advanced services. Because the ILECs are in many cases in the best position to develop and deploy such services, particularly in rural and other high cost areas, the Commission bears special responsibility not to dampen or eliminate ILECs' economic incentives to engage in such investment.

The dampening effects on innovation and investment created by forced sharing would occur with respect to all forms of intellectual property. Accordingly, the term "proprietary" should encompass all forms of intellectual property as set forth in the Department of Justice's intellectual property guidelines — property "protected by patent, copyright, and trade secret law, and . . . know-how."[51/] The category should broadly extend to elements that use any proprietary protocol, contain any proprietary information, or cannot be shared without divulging material that the incumbent would reasonably want to protect from disclosure as a trade secret.[52/]

The term "proprietary" also should extend to third-party proprietary interests, at least where the ILEC's own right to use, license, or otherwise transfer the element is restricted by the third-party's intellectual property interests. Depriving third parties of the right to price and control the distribution of their proprietary products will produce the same disincentives to innovation that apply to ILECs' own intellectual property.

To be faithful to Congress's purposes, the Commission should adopt the following test for unbundling proprietary elements:

> *Access to a proprietary element of an incumbent's network is "necessary" if (1) a functional substitute is unavailable from non-*

51/ *Antitrust Guidelines for the Licensing of Intellectual Property* ¶ 1.0.

52/ *See Local Competition Order*, 11 FCC Rcd at 15641-42 ¶ 282 (recognizing that proprietary elements include "elements with proprietary protocols or elements containing proprietary information").

> *ILEC sources or is available from such sources* *only* *at prices or on terms that would preclude meaningful opportunities for competitive entry by a reasonably efficient competitor, and (2) it is effectively impossible to provide telecommunications service without access to that element or a functional substitute from some other source.*

The first element of this test mirrors the "impairment" test: Because Congress created a higher threshold for unbundling proprietary elements, a proprietary element clearly should not be unbundled if it does not even meet the standard for unbundling nonproprietary elements. The second element establishes an additional condition before a proprietary element must be unbundled — that the element or its functional substitute is indispensable to providing service. This prong parallels the antitrust requirement that a facility (whether proprietary or not) should be required to be shared only when it is essential to a firm's ability to provide the product or service in question. This standard ensures that an ILEC will not be able to exclude others from the market for local telephone service even if it uses proprietary elements, while at the same time preserving much of the incentives for ILECs to continue to innovate and invest.

III. THE COMMISSION SHOULD IMPLEMENT ITS UNBUNDLING REQUIREMENTS THROUGH THE USE OF A COMBINATION OF NATIONAL RULES AND PRESUMPTIONS THAT COULD BE APPLIED BY STATE COMMISSIONS IN SECTION 252 PROCEEDINGS.

As the Commission applies section 251(d)(2) to various proposed network elements, it is not required to adopt one list of elements that must be unbundled in every market throughout the nation. Although the Commission took that approach in the *Local Competition Order*, it never was obligated to do so, and the wealth of market data and experience that is now available makes it possible to create much more precise and tailored unbundling requirements in response to the Supreme Court's mandate. Indeed, to ignore this data and to impose unbundling obligations in areas or markets where they are not needed would ignore Congress' command in section 251(d)(2) to unbundle elements only insofar as they are needed to provide an efficient competitor meaningful opportunity for competitive entry. Thus, to the extent it is administratively practicable, the Commission should consider non-uniform, tailored rules as it develops its unbundling regime.[53/] U S WEST proposes that the Commission use a set of national presumptions that states could readily apply in section 252 proceedings to determine which elements must be unbundled in which kinds of markets.[54/] Such presumptions could be made simple to apply and understand by basing them on objective market data and would provide a basis on which CLECs and ILECs could rely in planning their business strategies.

Of course, uniform nationwide unbundling requirements may well be appropriate for some network elements. The availability of some elements, for example, may not vary by geography or market, and a uniform nationwide rule could be the most efficient and administrable means of implementing section 251(d)(2) with respect to those elements. DSLAMs, for example, can be purchased and provisioned on terms that do not vary based on the market for which they are obtained. Furthermore, DSLAMs are scalable: They can be purchased and used in small increments without significant economies of scale. Thus, if the Commission finds that DSLAMs are competitively available and do not need to be unbundled *somewhere*, it

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[53/] AT&T has argued that the Act's assignment of the task of issuing unbundling rules to the Commission, rather than to the states, reflects an intention to develop nationwide standards. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Ex parte of AT&T, at 4 (filed Feb. 11, 1999). This is a non sequitur. There is no reason to assume that Congress intended to force the Commission to adopt what Commissioner Powell has characterized as a "one-size-fits-all" regime. *Second FNPRM*, Statement of Commissioner Powell.

[54/] The tailored approach advocated here is also consistent with the market definition standards employed in the *Merger Guidelines* relied upon by the FTC and the Justice Department. *See Hausman & Sidak Affidavit* ¶ 106.

also should find that they need not be unbundled *anywhere*. Conversely, some elements may *not* be available for competitive entry anywhere in the nation, and a nationwide rule requiring unbundling everywhere would be appropriate.

It is quite likely, however, that the availability of many elements varies by geographic market. As discussed in more detail in Part V, for example, switching passes the impair test, at least for now, in some areas of the country. In other areas, however, non-ILEC sources of switching unquestionably are available and have been used, and the impair test clearly is not met. It would not be appropriate, therefore, for the Commission to impose a nationwide unbundling requirement for switching because, as discussed in Parts I and II above, section 251(d)(2) requires the Commission to limit its unbundling requirements and to preserve market incentives to the greatest extent possible consistent with the necessary and impair standards. Thus, for elements whose availability varies by geography or other criteria, the Commission should carefully consider whether it should adopt unbundling rules that would apply on a market-by-market or region-by-region basis.

Of course, any unbundling regime that required a detailed market analysis for each wire center or metropolitan statistical area ("MSA") in the country would not be administrable. And it could delay entry for an extended period of time. Such individualized market studies, however, are not necessary. The Commission could easily administer tailored unbundling requirements by employing two useful tools.

First, where national rules are inappropriate because the availability of an element varies by market, the Commission should rely on a set of unbundling presumptions based on objective geographic or demographic measures that serve as reasonably accurate predictors of where elements are competitively available for entry. For example, if the record reveals that

MSAs above a certain population or customer-density level generally have competitive access providers who deploy their own fiber rings, the Commission could adopt a presumption that alternative sources of interoffice transport are available and that unbundling of that element is not required in any MSA with a population or line density above that level — and, conversely, that unbundling is presumptively required in MSAs that do not meet those criteria.

Using such presumptions, the Commission could fashion a precise unbundling regime without the administrative costs and delays arising from individualized, market-by-market analyses. Furthermore, such presumptions would build into the Commission's unbundling regime a self-executing, dynamic flexibility because unbundling obligations could change without Commission intervention as competition evolves throughout the nation. If, for example, the Commission adopts a presumption that an ILEC switch need not be unbundled if one or more CLEC switches are within 50 miles of the ILEC switch, then as more CLEC switches are deployed, fewer ILEC switches may have to be unbundled.[55/] In Part V of these comments, U S WEST proposes a number of such presumptions for specific elements. The *UNE Fact Report* prepared by USTA contains a large amount of market data that the Commission could use to develop other appropriate presumptions.

Second, the Commission should allow these unbundling presumptions to be implemented through the section 252 negotiation and arbitration process. Although any such presumptions should, for the sake of simplicity, be rather mechanical to apply, the Commission is not well-positioned to compile and monitor market data on a nationwide basis. In contrast, as

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55/ This is not to say, of course, that the moment the factual predicates of a presumption are met, the ILEC can cut off an unbundled network element being used by a CLEC. Rather, as discussed in Part VI below, the Commission can adopt reasonable transitional mechanisms for such circumstances.

Commissioner Powell has observed, state commissions have "closer proximity and more intimate knowledge" of these facts.[56] They would thus be ideally positioned to track such localized data on a current basis and to determine where the Commission's unbundling presumptions would or would not apply. An ILEC, CLEC, and state commission together should be able to determine, for example, the location of CLEC switches deployed in a rate center or the number of access lines in a wire center, if the Commission were to adopt presumptions based on such criteria.

Furthermore, state-level determinations would bring needed flexibility to the Commission's unbundling regime because both new entrants and incumbents would be allowed to rebut a Commission presumption with evidence that the presumption is not accurate for an individual market or area.[57] Of course, it should not be easy for a carrier to overcome a Commission presumption, because both ILECs and CLECs need some measure of certainty about unbundling obligations in order to engage in meaningful business planning. Parties therefore should be allowed to rebut a Commission presumption only on the strongest of evidence that particular characteristics in a market render it significantly different from others in which the presumption applies. Evidence that *a particular carrier* needs an element would not be sufficient; as with the necessary and impair tests generally, the key issue would be whether

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56/ *Second FNPRM*, Statement of Commissioner Powell at 5.

57/ The Commission clearly has authority to adopt presumptions that would be applied by the states. As the Supreme Court made clear in *Iowa Utilities Board*, the Act gives the Commission broad rulemaking authority to carry out section 251, and the states are obliged to follow those rules when establishing specific interconnection and unbundling obligations pursuant to section 252. *See* 119 S. Ct. at 730. The use of unbundling presumptions as described above would be a straightforward application of this scheme: The Commission would prescribe rules that embody rebuttable presumptions, and the states would apply those rules to the facts in specific situations.

the market differs in some way such that the presumption would not apply in the case of an *efficient* competitor. This standard should resemble that required to establish a waiver of Commission rules: The party seeking to overcome the presumption would be required to demonstrate in the state proceedings that special circumstances warrant deviation from the presumption and that deviation would serve the public interest.[58/] With these proposed features, the Commission's unbundling regime would be both administrable and narrowly tailored, as required by section 251(d)(2).

Although the states would have some flexibility in applying the Commission's presumptions based on unique local situations, the Commission should be careful not to give the states further flexibility to impose additional unbundling obligations not contemplated by the Commission's rules. As discussed above in Part I, section 251(d)(2) plays an integral part in Congress' plan to promote facilities-based competition by limiting what elements must be unbundled. If states are permitted to superimpose their own unbundling policies on top of the Commission's requirements, the purposes of section 251(d)(2) could be undermined. The Commission therefore should determine for each element that it considers in this proceeding whether the element must be unbundled everywhere, may not be unbundled anywhere, or may be unbundled only pursuant to a presumption established by the Commission. For any element *not* addressed in this proceeding, the Commission should prohibit the states from imposing any unbundling requirements. States or CLECs could, of course, petition the Commission to amend its rules to adopt new unbundling requirements based either on a change of circumstances or the

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58/ *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). As Judge Leventhal recognized in the leading case, a proponent of such a waiver "faces a high hurdle even at the starting gate." *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

failure of the Commission to consider an element in this proceeding.[59] The states, however, should not be allowed to impose additional unbundling requirements before the Commission has been given a chance to consider whether such unbundling is compatible with section 251(d)(2) and the pro-competitive goals of the 1996 Act.

IV. THE PROPONENTS OF MANDATORY UNBUNDLING SHOULD BEAR THE BURDEN OF PROOF IN THESE PROCEEDINGS.

In evaluating whether to require LECs to unbundle various elements, the Commission should assign the burden of proof to those parties advocating that an element be unbundled. As section 251(d)(2) recognizes, forced sharing of facilities with competitors is a substantial deviation from the normal operation of a competitive marketplace and should occur only when required to ensure the development of competition. Indeed, under the essential facilities doctrine, proponents of sharing bear a heavy burden of showing why such an extraordinary remedy is necessary.[60] The Commission therefore should not require an element to be unbundled unless CLECs have clearly demonstrated that the necessary and impair standard has been satisfied (*i.e.*, that an element is available from non-ILEC sources *only* at prices or on terms that would preclude meaningful opportunities for competitive entry by an efficient competitor). Although theory and speculation may have been the only basis to justify unbundling in 1996, they cannot suffice now in light of the extensive specific empirical evidence that is available.

59/ As noted in Part VI below, ILECs should similarly be permitted to petition to eliminate unbundling requirements or presumptions based upon market developments.

60/ *See David L. Aldridge Co.*, 995 F. Supp. at 752-53 (describing burden on plaintiff seeking access to essential facilities); IIIA Areeda & Hovenkamp, *supra*, ¶ 773b; *cf.* 5 U.S.C. § 556(d) ("[T]he proponent of a rule or order has the burden of proof.").

Assigning the burden of proof to CLECs is particularly appropriate because CLECs have unique access to most of the statistical and market evidence that the Commission should consider under section 251(d)(2). As the Commission and the courts have traditionally recognized, parties with unique access to relevant data ordinarily bear the burden of producing that evidence,[61] and their failure to produce it raises the presumption that it is harmful to them.[62] In this proceeding, only CLECs have complete information about what facilities they have been able to deploy and the costs and other terms on which they can obtain elements from non-ILEC sources. Indeed, as the *de Fontenay Report* demonstrates, new entrants typically will spend substantial resources investigating multiple network designs and determining how facilities can be provisioned from alternative sources. With their networks substantially complete, however, ILECs generally do not conduct such investigations or collect such data. Thus, if CLECs fail to come forward with the substantial and detailed evidence they possess regarding an element's

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61/ *See, e.g., Implementation of the Non-Accounting Safeguards of Sections 271 and 272*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905, 22072 ¶ 345 (1996) (placing burden of production on "the party most likely to have relevant information in its possession"); *Application of Illinois Bell Telephone Co.*, CC Docket No. 78-314, Memorandum Opinion and Order, 69 F.C.C.2d 1199, 1213 ¶ 32 (1978) (placing burden of production and burden of proof on party that had "sole possession" of key information).

62/ *See* 2 Wigmore, *Evidence* § 285 (Chadbourn rev. 1979) ("The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so; and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party."); *see also Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156-57 (4th Cir. 1995); *Evans v. Robbins*, 897 F.2d 966, 970 (8th Cir. 1990); *Callahan v. Schultz*, 783 F.2d 1543, 1545 (11th Cir. 1986); *International Union (UAW) v. NLRB*, 459 F.2d 1329, 1336-42 (D.C. Cir. 1972).